88-1684

Supreme Court, U.S.
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NO.

In the

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM P. HENDERSON,
Petitioner

VERSUS

L. G. BALFOUR COMPANY,
Respondents

PETITION FOR CERTIORARI
TO U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

BLAKE BAILEY
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QUESTIONS PRESENTED

Whether the Fifth Circuit Court of Appeals erred in reversing and rendering a judgment based upon a jury verdict when there was substantial and persuasive evidence that Defendant had breached the implied covenant of good faith and fair dealing in negotiating the continuation of Plaintiff's employment?

Whether the Fifth Circuit Court of Appeals erred in concluding that Plaintiff was not constructively discharged under Massachusetts law?

LISTING OF ALL THE PARTIES

Undersigned counsel for Petitioner, William P. Henderson, provides the following list of parties as required by Supreme Court Rule 21.1(b):

1. William P. Henderson, Petitioner

2. L. G. Balfour Company, Respondent,
   Its owner Thomas G. Wyman and employees

3. Counsel:

   a. Bailey, Negem, Patterson & Drott;
      Tyler, Texas

   b. Reynolds, Shannon, Miller, Blinn, White
      & Cook; Houston, Texas

   c. Choate, Hall & Stewart; Boston, Massachusetts

BLAKE BAILEY

COUNSEL FOR PETITIONER,
WILLIAM P. HENDERSON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM P. HENDERSON

Petitioner

VERSUS

L. G. BALFOUR COMPANY,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, William P. Henderson, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding August 18, 1988.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Texas, Tyler Division, Hon. William Steger presiding is unreported but a copy of the Order denying Defendant's motion for judgment notwithstanding the verdict is appended to this Petition as Appendix A. The opinion of the Court of Appeals for the Fifth Circuit is reported at 852, F.2d 818. A copy of this opinion is reproduced in the Appendix as Appendix B. Judgement of the District Court is attached as Appendix C and the Fifth Circuit denial of rehearing is attached as Appendix D.

JURISDICTION

The opinion of the Court of Appeals for the Fifth

Circuit was published August 18, 1988. A timely motion for rehearing and suggestion of rehearing en banc was denied November 22, 1988. The Judgment of the Fifth Circuit was entered December 6, 1988. An extension of time for filing the Petition for Certiorari was granted by Justice White. This Petition for Certiorari has been filed within that extension. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL TREATY OR STATUTE PROVISIONS

The Seventh Amendment to the United States Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined by any Court of the United States, than according to the rules of the common law."

Articles of Annexation, Joint Resolution March 1, 1845, 5 U.S. Stat. 797 states:

> "Resolved, by the Senate and House of Representatives fo the United States of America in congress assembled, That Congress doth consent that the territory properly included within, and rightly belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union."

* * *

* * *

STATEMENT OF THE CASE

Henderson had worked in the East Texas area for some seventeen years in developing a personal relationship with officials of 116 schools, generating $360,000.00 plus sales volume per year. The company for which Henderson worked went out of business. Henderson negotiated with several other companies and eventually went with Balfour. Although Balfour hired Henderson on a commission basis, Henderson was guaranteed the last annual salary from his previous job of $54,300.00 for a three year period. During these three years Henderson was to convert the $360,000.00 worth of business and stabilize these accounts for Balfour (Appendix E, F and G). The representations made to Henderson was that once this three year transition period took place a new arrangement would be negotiated.

Henderson was required under this agreement to sign a covenant not to compete with Balfour which legally precluded Henderson from working his accounts for several years after any termination.

All of the business that Henderson had been servicing was converted to Balfour's business and stabilized during the three years he worked for Balfour.

Henderson did not work out of Balfour's facility and consequently bore his own expenses. Balfour enjoyed over $100,000.00 a year profit off of new sales converted and stabilized by Henderson, while at the same time Balfour incurred no additional overhead.

Balfour knew of special financial hardships being suffered by Henderson but at the end of the three years Henderson's salary was cut from $54,300.00 per year, which was the amount of money guaranteed as a

minimum for Henderson, to $41,000.00. Henderson felt forced out and left his position. He was replaced by the twenty-five year old son of the regional manager. Under the additional bonus system, with the reduction from $54,300.00 to $41,000.00, Henderson would have had to increase his annual sales from $360,000.00 per year to $500,000.00 per year just to get back to the salary he was guaranteed three years before.

Henderson then filed a charge of age discrimination against Balfour under the Age Discrimination in Employment Act of 1967 and filed suit against Balfour in Federal District Court in Tyler, Texas asserting that Balfour had constructively discharged him in violation of the A.D.E.A. and in breach of the implied covenant of good faith and fair dealing as recognized by Massachusetts' Supreme Court in *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d. 1251 (1977).

The jurisdiction of the District Court over this state law claim was invoked by Henderson under the U.S. District Court's pendant jurisdiction to consider ancillary state law claims arising out of the same operant facts as recognized by this Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

The case was submitted to a jury which found against Henderson on his age discrimination claim, but returned a verdict for Henderson on the claim that Balfour breached the implied covenant of good faith and fair dealing in constructively discharging Henderson.

Balfour following the entry of the verdict filed a Motion for Judgment notwithstanding the verdict which the trial court denied. The Fifth Circuit reversed and rendered judgment for Balfour.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT CONFLICTS WITH THE OPINIONS AND RULES OF THIS COURT AND WITH FEDERAL STATUTORY LAW.

In *Brady v. Southern Railroad*, 320 U.S. 476 (1943) this court announced the standard by which a Federal Court is authorized to direct a verdict.

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict the Court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims." 320 U.S. at 479-80.

The granting of a judgment notwithstanding a verdict raises Seventh Amendment problems when appellant court reweighs the credibility of witnesses. Any weighing of the credibility of witnesses amounts to a "reexamination" of the verdict within the meaning of the Seventh Amendment.

Among the factual disputes requiring resolution by the jury were the questions of whether Balfour had intentionally made offers which were financially unattractive, thereby constructively discharging Henderson; whether Balfour obtained a windfall from the

future business of annual accounts generated by Henderson's performance of the three year contract and whether Balfour acted in bad faith in renegotiating the extension of the contract.

The Court of Appeals in its decision below did not even mention the standard of review it was using in reversing the judgment, but resolved all of the fundamental conflicts against Henderson despite substantial and persuasive evidence in support of the verdict.

Just some of the examples of the statements by the Court versus statements in the transcript are submitted below.

OPINION

"This guaranteed salary (the minimum salary offered to Henderson) was higher than that paid to any other salesman in the regional office,. . ." page 4928.

TRANSCRIPT

"Q. So, in other words, the guidelines from Balfour would be that the commissions sent to the Regional Office, the guidelines would be that they could send as much as eighty percent; that would be sixty percent commission and twenty percent expenses; to their salesmen for the work that they did; is that right?

A. That's right.

* * *

Q. What percentage of commissions that were sent to the Regional Office, the sixty-nine thousand, were actually paid to you?

A. Approximately eighty percent. I made sixty-nine. I received fifty-four.

Q. That would be seventy-eight percent of it?

A. I believe that's correct."

(Transcript, pg. 38, line 12 - pg. 39, line 4)

OPINION

"In exchange, he received a guaranteed salary and support facilities." p. 4929

TRANSCRIPT

"Q. Now, during that period of time, did Balfour cover any of your expense or anything of that nature?

A. Expenses they paid were long distance telephone calls, note pads that we distributed to schools and calendars — activity calendars. They paid for that.

Q. Well what about an office or anything of that nature?

A. I provided my own office in my home in Tyler, Texas.

Q. Well, how much did they pay on your long distance bills per month?

A. Approximately twenty-five or thirty dollars a month, I would suppose. Strictly business calls."

(Transcript, pg. 27, line 8 - line 19)

OPINION

"The second offered continued employment at a guaranteed yearly salary of $41,400.00 representing about a $13,000.00 salary cut. In another respect, however, the proposal bettered his former wage package: he was to receive 50% of every gross commission dollar generated in excess of his 1983 figures. . ." page 4929.

TRANSCRIPT

"A. Well, I was very disappointed. I was utterly disappointed. I just felt like I had done a good job, and I would be rewarded for it. I thought that my salary would increase, not be decreased.

* * *

Q. Did you feel that you were able to stay there under those circumstances?

A. No, I did not feel like I could stay.

* * *

Q. State whether or not you felt at that time that you were forced into taking your retirement?

A. Oh, yes, definitely I was forced out."

(Transcript, pg. 40, line 2 - 21)

A. -- looks like I've been handed three death sentences."

(Transcript, pg. 82, line 6)

Q. Did you feel that any of them were a true option for you, as far as your future?

A. No, sir."

(Transcript, pg. 88, line 25 - pg. 89, line 2)

NOTE

The 50% commission refers to money sent to the Regional Office from Balfour. Mathematically it is obvious that Mr. Henderson would have to dramatically increase ($360,000 to $500,000) his gross sales to equal the amount of money that he was making before originally going with Balfour. There was reason for him to believe that once he increased gross sales again

his reward would be to have another 25% reduction in compensation.

TRANSCRIPT

"Q. The gross volume. All right, and then, in addition to that, L.G. Balfour in that proposal to you said, look, Mr. Henderson, if you go out and sell more business than what you did last year, which was the sixty-nine thousand dollar commission here, we will pay you fifty percent of every other dollar of commission over and above that. In other words, if you went out and went to some of these other schools in this twenty-five county area and made additional sales, that they would pay you fifty percent of commissions on those sales?

A. When I reached the sixty-nine thousand dollar level.

Q. The sixty-nine thousand dollar level produces the forty-one four, which they were going to pay you?

A. Base.

Q. Base. And, therefore,

A. Then, when I moved that other sixty-nine thousand, then I get fifty percent of what is sold.

Q. If you simply retained the same business that you'd had the prior year, it's going to produce the sixty-nine thousand — this very same business that you had the prior year, and you've already told us that wasn't a problem. You thought you could do that. So, if you went out and made any additional sales at all, you were going to get a fifty percent, commission on those sales. You don't agree with that?

A. We've been through this before in the deposition. I still contend that as this was explained to me, I had to reach that sixty-nine thousand dollars again in commission before I would start getting the fifty percent additional commission on any new business."

(Transcript pg. 67 line 13 - pg. 68 line 15)

OPINION

"Essentially Balfour proposed to shift some of the risk of generating new sales to Henderson" Page 4929

NOTE

There is no such reference any where in the transcript.

OPINION

"Mr. Henderson's retirement benefits under his previous three year contract were also guaranteed." Page 4929.

NOTE

The retirement benefits were earned under the previous contract and therefore did not have to be reguaranteed under any proposed new contract.

OPINION

". . .he acknowledges that no specific representations were made to him but claims that it was the 'atmosphere' of the meetings that guided him to his renegotiation expectations." page 4919

NOTE

For direct testimony which fully supports Mr. Henderson's understanding that his contract would be renegotiated for an extended period of time as well as

at a higher rate see specifically the following excerpts from the transcript:

Transcript, pg. 20, line 3 - pg. 21, line 14;

Transcript, pg. 24, line 5 - pg. 25, line 12;

Transcript, pg. 25, line 22 - pg. 26, line 9;

Transcript, pg. 27, line 20 - pg. 29, line 17 and

Transcript, pg. 34, line 1 - line 2.

(A copy of the Transcript is attached as Appendix H)

NOTE

The Jury by the circumstances of the agreement had a right to assume an implied contract for future years if conditions were met. *Goldhor v. Hampshire,* 521 N.E.2nd 1381 (Mass. Ct. App. 1988). It is unreasonable to believe that Henderson would have (1) accepted as his salary for three years the amount of money he had made previous to his employment with Balfour; (2) agreed to convert all his accounts; (3) stabilize business for Balfour and (4) sign a noncompetitive agreement, if it was not clear from the negotiations that he would be rewarded if he could accomplish the conversion and stabilization of the business.

OPINION

"If any thing, the cut in pay to forty-one thousand four hundred dollars was more than off set by the larger percentage offered on future commissions, the package actually provided Mr. Henderson the opportunity to earn more money." page 4931

NOTE

There is absolutely no evidence of any type in the transcript that the market would bear additional sales for Henderson that would have caused him even to be

able to reach his old salary much less to make more money. This at best was conjecture on the part of the Court. Mr. Henderson would have had to raise his sales from $360,000.00 to $500,000.00 just to get back to his old salary.

OPINION

"Nor does Mr. Henderson show that Balfour is liable for a loss of future compensation that is clearly related to his past service in establishing the accounts.

* * *

Although Balfour has Mr. Henderson's former accounts, given a competitive market is not clear that it can keep them" page 4931

TRANSCRIPT

"Q. The business, of course, that Mr. Henderson, brought to Balfour, after it had been brought there, stabilized; Balfour, I think, has about ninety percent of still going, requires almost no effort to keep up now; is that correct?

A. That's an evaluation that I'm not so sure that I'd like to make. I think if you ask Bill or Ralph, there's quite a lot of effort involved in maintaining existing business. When it's a maintenance level situation, that's only part of the responsibilities of sales offices, yes.

Q. Okay. The reason I ask that is, because in your deposition we were talking about the effort to continue the business after Mr. Henderson got it stabilized. On page 39 of your deposition we're talking about the sixty-nine thousand dollars. The sixty-nine thousand dollars represents commissions generated by the

schools Bill was calling on. That existing business, that if he did nothing else the following year, but stop in and see these people, he would probably hold that business. Is that correct?

A. That's correct."

(Transcript. pg. 178 line 25 - pg. 179 line 18.)

NOTE

See Balfour's Brief to the Fifth Circuit at page 6. There it judicially admits to the lack of effort necessary to keep the files (Appendix I).

This type of judicial review effectively does away with a citizen's right to trial by jury as guaranteed by the Seventh Amendment. It also is tantamount to a federal judicial attack on the Texas Constitution:

Article I Section 13:

". . .All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

Article V Section 10:

"In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right to trial by jury . . ."

Such an attack violates the guarantees provided to the Republic of Texas incident to its annexation. Articles of Annexation, Joint Resolution March 1, 1845, 5 U.S. Stat. 797. The people of Texas were promised the right to a Republican form of government. The Texas constitution forming that government affords the highest level of rights to trial by jury. Such rights are all but destroyed by opinions such as the one now before this Court.

II

THE COURT OF APPEALS HAS FAILED TO ENFORCE THE LAW OF THE STATE OF MASSACHUSETTS AND TO GIVE FULL EFFECT TO THE JURY VERDICT.

In *Fortune v. National Cash Register Co.*, 373 Mass. 96 (1977) the Massachusetts Supreme Court became one of the first to recognize a public policy exception to the general rule of at-will employment. The court in *Fortune* held that a covenant of good faith and fair-dealing was imposed by law and that a termination not made in good faith was actionable. In *Fortune*, the employer terminated the employee following his obtaining a multi-million dollar order for the purpose of depriving the employee of his commission. Massachusetts state courts apply the *Fortune* good faith and fair-dealing duty equally to actual and constructive discharge situations. *Kravetz v. Merchants Distributors, Inc.*, 387 Mass. 457, 440 N.E.2d. 1278 (1982).

The Fifth Circuit in its opinion has ignored Massachusetts law which recognizes that creating economically unattractive work can and has constituted discharge.

> *School Committee of Stroughton v. Labor Relations Commission, et al*, 346 N.E.2d 129 (Mass. Ct. App. 1976). "The Commission found that the revision was intended to discourage continued employment and obviously made the work economically unattractive. We consider that to be the equivalent of a finding of constructive discharge and we conclude that the evidence supports such a finding."

See also *Williams v. Caterpillar Tractor Company*, 770 F.2d 47 (6th Cir. 1985).

Massachusetts law allows surrounding cir-

cumstances to create an implied contract for future years of employment even though the contract was originally conceived as an at-will employment.

The Fifth Circuit opinion flies in the face of both the spirit and the words of the Massachusetts decisions. In the Fifth Circuit's opinion at page 4931, it indicates that retirement was

> ". . .the most that Mr. Henderson had a right to expect; and this is what the proposal set out. And although Mr. Henderson claims that the 'atmosphere' of the meeting indicated an automatic renewal of the employment agreement, we are aware of no law that perceives on any such basis."

Henderson, however, did not contend that there should be an automatic renewal, but argued that there was an implied contract for future years provided the condition precedent of converting and stabilizing the accounts was met. This is exactly the issue, addressed in *Goldhor v. Hampshire College,* id.

> "the evidence recounted in a text was sufficient to submit to a jury the question whether the Plaintiff had an implied contract for future years conditioned on obtaining funding."

Although, the Fifth Circuit correctly quotes *Gerald Rosen Co., Inc. v. International Telephone & Telegraph Co., Inc.*, 16 Mass. App. 929, 450 N.E.2d 189 (1983) indicating that generalized expectation of future orders are not recognizable damages, the Court, failed to quote those cases that deal with circumstances existing in the case at bar. *Gram v. Liberty Mutual Insurance Company*, 461 N.E.2d 796 (Mass. 1984) (renewal of premiums of insurance policies previously sold by wrongfully discharged insurance salesman are proper damages). *Maddaloni v. Western Mass. Bus Lines, Inc.*, 438 N.E.2d 351 (Mass. 1982) (wrongfully discharged

employee entitled to future commissions of work created as a result of the ICC granting a charter to the employer. The charter had been obtained through past efforts of the wrongfully discharged employee). *Goldhor v. Hampshire College* id. (college professor entitled to future salaries for years not worked for the university as a result of wrongful discharge).

III.

THE FIFTH CIRCUIT'S REVERSAL OF A JURY DECISION CONCERNING THE *FORTUNE* GOOD FAITH TEST CONFLICTS OTHER CIRCUIT OPINIONS.

The Fifth Circuit's review of fact findings supporting *Fortune* contractual duties can not be reconciled with such opinions as: *Big Horn Coal Co. v. Commonwealth Edison Co.*, 852 F.2d 1259, 1268 F.N. 13 (10th Cir. 1988); *Lucas v. Brown & Root Inc.*, 736 F.2d 1202, 1204 (8th Cir. 1984) and *Smith v. Atlas Off Shore Boat Service*, 653 F.2d 1057, 1062 F.N. 13 (5th Cir. 1981).

Herein, the Fifth Circuit Court of Appeals not only declined to give full force and effect to the jury verdict, but also in doing has frustrated the enforcement of the law of Massachusetts.

CONCLUSION

For the foregoing reasons, the petitioner for Writ of Certiorari, should be granted.

Respectfully submitted,

BAILEY, NEGEM, PATTERSON
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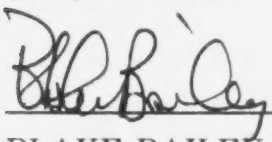

BLAKE BAILEY
ATTORNEY FOR PETITIONER
BAR NO. 01514500

CERTIFICATE OF SERVICE

I, the above signed attorney, hereby certify that a true and correct copy of the foregoing has been deposited in the United States Mail, postage prepaid, on the 14th day of April, 1989, to: Joseph E. O'Leary, Stephen K. Fogg, Thomas E. Shirley, CHOATE, HALL & STEWART, Exchange Place, 53 State Street, Boston, Massachusetts 02109 and Stanley B. Binion, REYNOLDS, WHITE, ALLEN & COOK, 3300 Allied Bank Plaza, 1000 Louisiana, Houston, Texas 77002-5087.

BLAKE BAILEY

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

WILLIAM P. HENDERSON	§	
VS.	§	NO. TY-85-238-CA
L. G. BALFOUR COMPANY	§	

ORDER

On this day came on to be heard the Defendant's Motion for Judgment and or Motion for New Trial. After due consideration of the motion, response and applicable law the Court is of the opinion the motion should be denied. The trial presented this Erie court with a difficult body of Massachusetts common law; the contours of which still have not been fully defined. However, the Court is not convinced that, after consideration of all the evidence with all reasonable inferences drawn in favor of Plaintiff, that those facts and inferences are so overwhelmingly in favor of Defendant that reasonable minds could not have arrived at the verdict rendered. Boeing Company v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). Further, the Court is not convinced that Defendant has demonstrated sufficient grounds for the Court to set aside the verdict of the jury and order a new trial. Fed. R. Civ. P. 59; see also Smith v. Transworld Drilling Co., 773 F.2d 610 (5th Cir. 1985).

It is therefore ORDERED that the Defendant's Motion for Judgment and or New Trial be DENIED in all respects.

SIGNED this 22 day of July, 1987.

William M. Steger
United States District Judge

APPENDIX B

WILLIAM P. HENDERSON

PLAINTIFF-APPELLEE,

V

L. G. BALFOUR COMPANY,

DEFENDANT-APPELLANT.

NO. 87-2860

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT

Aug. 18, 1988

Former employee brought action against employer for damages for alleged breach of implied covenant of good faith and fair dealing with respect to renegotiation of contract of employment. Following jury trial, the United States District Court for the Eastern district of Texas, William M. Steger, Jr., denied employer's motion for judgment notwithstanding verdict and entered judgment for employee. Employer appealed. The Court of Appeals held that (1) under Massachusetts law, which governed the contract, employer breached no implied covenant of good faith and fair dealing in its renegotiation as options offered employee were tolerable and in keeping with any conceivable reasonable expectations arising from his employment relationship, and (2) employer did not constructively discharge employee.

Judgment reversed and rendered for employer.

1. Master and Servant

Although termination provision of Sales Representative Agreement gave employer right to end employment relationship "at will," the employer had obligation under Massachusetts law, which governed contract, to deal in good faith in negotiating new employment contract.

2. Master and Servant

Under Massachusetts law, employers are liable for breach of implied covenant of good faith and fair dealing only when they have terminated an employee.

3. Master and Servant

Under Massachusetts law, obligation of good faith and fair dealing requires that employer be liable for loss of compensation that is clearly related to an employee's past service when the employee is discharged without good cause.

4. Master and Servant

Under Massachusetts law, employer's proposals for renewal of employment contract were not conditions so intolerable as to compel employee to resign and thus constitute "constructive termination" where one option embodied reasonable expectations arising from earlier agreement; second proposal, although calling for salary reduction, offered opportunity for larger income in commissions; and third option enabled employee to work for six more months and then to accept retirement plan in line with any reasonable expectations derivable from prior contract.

5. Master and Servant

Although employer had sales employee's former accounts, it was not clear that it could keep them in a competitive market and thus, under Massachusetts law, future income was not merely function of employee's past services and employer breached no implied covenant of good faith and fair dealing in its renegotiation of employment contract that was terminable at will.

Joseph E. O'Leary, Thomas E. Shirley, Stephen K. Fogg, Choate, Hall & Stewart, Boston, Mass., for defendant-appellant.

Blake Bailey, Jimmy Michael Negem, Tyler, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of Texas.

Before BROWN, GEE and GARWOOD, Circuit Judges.

PER CURIAM:

L.G. Balfour Company appeals a decision by the district court denying its motion for judgment notwithstanding the verdict and, in the alternative, for a new trial. Its former employee, William P. Henderson, had sued the company seeking damages for their dispute over the terms of his employment contract. Mr. Henderson contended that he had an employment contract of indefinite length with Balfour but that the company constructively discharged him by forcing him to choose among renegotiation options that

were intolerable. At trial a jury awarded Mr. Henderson $263,765.34 in damages for Balfour's breach of an implied covenant of good faith and fair dealing with respect to the terms of his employment. Upon review, however, we conclude that the record evidence entirely fails to make out such a case under Massachusetts law and that Balfour's motion for instructed verdict should therefore have been granted.

I. Background

Balfour, headquartered in Massachusetts, sells, among other items, class rings and graduation-related products. Appellee Henderson, a former employee of Star Engraving Company, had sold such graduation-related items in East Texas for over seventeen years. In the spring of 1981, upon the business failure of Star, Balfour began to take over Star's assets; and Balfour and Mr. Henderson began negotiations with a view to having Mr. Henderson service this same part of Texas for Balfour. For Mr. Henderson, such a position would allow him to work for a firm with a wide variety of resources and to minimize his risk of obtaining commissions by drawing upon a guaranteed salary promised by Balfour. For Balfour, the employment relationship promised to strengthen its presence in the East Texas market, because Mr. Henderson would transfer his established accounts to the company in the course of time. Both sides agree that the bargaining process was competitive, with each side looking to its own interests. At issue is what the agreement finally arrived at required of each side. In order to resolve this dispute, we must first examine the basic bargain.

A. The Basic Bargain: The Sales Representative Agreement and Supporting Documents

The Sales Representative Agreement defined the basic employment relationship. Both sides entered into the agreement on July 1, 1981. The very firsts article provides clearly that the employment relationship could be terminated "by either party by giving thirty (30) days notice in writing by registered mail." Thus, far from being buried in the document, the termination clause made clear at its outset that Mr. Henderson was entering into an "at-will" employment relationship.

Second, article six of the agreement provides that the "compensation of the Sales Representative shall be agreed on between the Regional Representative and the Sales Representative which

shall include a salary for the Sales Representative and an allowance for his expenses." Thus, Henderson's compensation was to be the subject of periodic negotiations; if either side became dissatisfied with it, the termination clause provided an escape.

Finally, article ten provided that the Sales Representative Agreement was to be construed in accordance with the laws of Massachusetts. Moreover, except for side agreements such as those providing for compensation, the Sales Representative Agreement "supersede(d) all previous agreements between the parties. It constitute(d) the whole Agreement between the parties and there (were) no terms nor conditions, nor obligations made, or entered into, by Balfour other than (those) contained in the Agreement." Article ten, then, specified that the entire employment relationship was to be governed by the Sales Representative Agreement which, in turn, is best epitomized by its "at-will" provision in article one.

Based on the Sales Representative Agreement, Mr. Henderson negotiated a salary with the regional representative. From 1981 through May 1984, Balfour paid Mr. Henderson $54,307.26 each year and afforded him the possibility for earning more money by way of commission bonuses. This guaranteed salary was higher than that paid to any of the other sales men in the regional office, a distinction attributable in part to the fact that Mr. Henderson brought accounts with him when he came to the firm.

Although the Sales Representative previous agreements between the parties (and that it) constitute(d) the whole Agreement," Mr. Henderson introduced in evidence two prior documents which he considered added to the obligations assumed by Balfour. These two documents supplemented the Sales Representative Agreement and were incorporated as part of the employment relationship through article six, which allowed for compensation to be arranged through side-agreements with the Regional Representative.

The first document was a memorandum dated April 13, 1981. It detailed various aspects of Mr. Henderson's compensation structure. Significant for this dispute is paragraph four, providing:

> Retirement will be based on 100% of the gross commission for the school years 1978-1979, 1979-1980 and 1981-1981 with the equity being equally divided over a five-year period. Retirement will begin at his (Henderson's) option, no earlier than July 1, 1984. (emphasis added).

This document obligated Balfour to provide a retirement package that Mr. Henderson could invoke, while committing Mr. Henderson to at least a three-year tenure if he wished to receive that package.

The second document which Mr. Henderson introduced reinforced these commitments. Dated April 24, 1981, it set out in more formal terms the variety of obligations to which each side was committing itself. Most important, paragraph three of Mr. Henderson's obligations set the contract term for a period of "three years commencing July 1, 1981 to June 30, 1984."

These two documents, in addition to the Sales Representative Agreement, created the entire employment relationship from which this dispute arose. Simply stated, as Mr. Henderson agreed in cross-examination, the "fifty-four thousand dollar deal was a three-year deal, and then, (he) could retire, or it could be renegotiated, or whatever."

B. The Renegotiation

Mr. Henderson worked for Balfour from 1981-1984 and converted his accounts to Balfour over this time as part of the bargain. In exchange, he received a guaranteed salary and support facilities. Beginning in February 1984, with the three-year contract period drawing to a close, Balfour and Mr. Henderson opened communications about their future relationship. By May 1984, with the end of the tenure term only a month away, Henderson had not responded to Balfour's efforts to confect a new working relationship. It is important to bear in mind that the termination option was available to either party at this time for use in severing the relationship. Since Mr. Henderson had not completed three years of service, such a termination would have operated under the April 13, 1981, memorandum to deny him retirement benefits; and if Balfour was seeking to be rid of Henderson, this was the time to strke, since Henderson had converted most of his accounts to the company.

Instead, in a letter dated May 29, 1984, Balfour made three proposals to Mr. Henderson regarding their future business relationship. The first offered him immediate retirement July 1, 1984, under the terms of the retirement program specified in the April 13, 1981, document. The second offered continued employment at a guaranteed yearly salary of $41,400, representing about a $13,000 salary cut. In another respect, however, the proposal

bettered his former wage package: he was to receive 50% of every gross commission dollar generated in excess of his 1983 figures, a commission twice that paid to other salesmen. Essentially, Balfour proposed to shift some of the risk of generating new sales to Henderson. Under this proposal, Mr. Henderson's retirement benefits under his previous three-year contract were also guaranteed. Finally, the third proposal offered a reduced salary plus an accelerated retirement program. Henderson would receive a $20,000 base salary for six months (July 1, 1984 through January 1, 1985) plus approximately $50,000 in retirement benefits to be paid in installments between September 1, 1984 and January 1, 1986.

Mr. Henderson, after less than a month's consideration of these options, chose proposal three as the next step in his employment relationship with Balfour—and brought this action. He acknowledged at trial that he received all the money that he was due under the option that he selected.

It now appears that Mr. Henderson may have made various assumptions about his ability to negotiate a life-time bargain with Balfour: He acknowledges that no specific representations were made to him, but claims that it was the "atmosphere" of meetings that guided him in his renegotiation expectations. We are, however, limited in our capacity to grasp and give effect to "atmosphere"; hence we must rely on the written structure of the 1981 employment contract and the reasonable expectations that could arise from it.

II. Analysis

Despite the at-will feature of the employment contract, the jury awarded Mr. Henderson $263,765.34 in damages, concluding that Balfour breached an implied covenant of good faith and fair dealing in its negotiations with Mr. Henderson over contract renewal. In examining contract jurisprudence so as to evaluate the verdict, we focus on Massachusetts law, which both parties agree would govern the employment relationship.

Good Faith and Fair Dealing

Mr. Henderson maintains that the term of employment he agreed upon with Balfour in 1981 was open-ended and that he believed he would have a life-time job at the same wages. He contends that Balfour violated this aspect of the employment contract by making renegotiation offers that required him either to

take an unacceptable pay cut or to elect retirement. In his view, proposal two, that which allowed continued employment, was really a non-option since it so radically altered the current terms of his employment that he was precluded from remaining on the job. In creating this non-option, we are told, Balfour negotiated in bad faith.

(1-3) Although the termination provision of the Sales Representative Agreement gave Balfour the right to end the employment relationship "at will," Massachusetts jurisprudence imposes an obligation upon Balfour to deal in good-faith. See Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251, 1255-56 (1977). Massachusetts courts have held employers liable for breach of the implied covenant of good faith and fair dealing, however, "only when they have terminated an employee." McCone v. New England Telephone and Telegraph Co., 393 Mass. 231, 471, N.E.2d 47,50 n. 7 (1984) (emphasis added). It is Henderson's claim that he was constructively terminated by Balfour.[1] Second, "the obligation of good faith and fair dealing . . . requires that the employer be liable for the loss of compensation that is so clearly related to an employee's past service, when the employee is discharged without good cause." Gram v. Liberty Mutual Insurance Co. (Gram II), 384 Mass. 659, 429 N.E2d 21, 29 (1981) (citations omitted). "Our (Massachusetts' courts) decisions have recognized a distinction between the loss of future wages for past service and the loss of future income for future services." Id. Henderson claims that Balfour's future income from the accounts that he converted to it under the employment relationship would be attributable solely to his past services since it would take little effort to maintain the accounts. In this respect, he characterizes ring sales arising from his former accounts as mere "renewals."

(4) Henderson's presentation does not meet these criteria. First, we cannot conclude that the renewal proposals were conditions so

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Although Massachusetts courts have assumed that such terminations may be either actual or constructive, see McCone, supra, 471 N.E.2d at 49-51, they have said little about what constitutes constructive termination in at-will contexts. A typical formula, based on Texas law, runs: "An employer's activities may be deemed to amount to a constructive discharge only if 'the employer made conditions so intolerable that the employee reasonably felt compelled to resign.'" Kelleher v. Flawn, 761 F.2d 1079, 1066 (5th Cir. 1985).

intolerable as to compel Mr. Henderson to resign. To the contrary, his choice of option three enabled him to work for six more months and then to accept a retirement plan that was in line with any reasonable expectations derivable from his 1981 contract.[2]

As we note above, Henderson rejected proposal one, which embodied the reasonable expectations arising from the 1981 written agreements. Those provided for a three-year, fifty-four thousand dollar per year deal which, if completed, made him eligible for a retirement plan based on his commissions from 1978-81. This is the most that Mr. Henderson had a right to expect; and this is what proposal one set out. And although Mr. Henderson claims today that the "atmosphere" of the meetings indicated an automatic renewal of the employment agreement, we are aware of no law that proceeds on any such basis. Nor did proposal two produce intolerable conditions. If anything, the cut in pay to $41,400 was more than offset by the larger percentage offered on future commissions, and the package actually provided Mr. Henderson the opportunity to earn more money. Thus, based on what reasonable expectations might be inferred from the 1981 agreements, and examining Balfour's proposal for contract renewal, it is impossible to conclude that Mr. Henderson was constructively terminated.

Nor does Mr. Henderson show that Balfour is liable for a loss of future compensation that is clearly related to his past service in establishing the accounts. As we note above, Massachusetts courts distinguish between the loss of future wages for past services, which is covered under an implied covenant of good faith, and the loss of future income for future services, which is not. Mr. Henderson tries to claim that his past services in initiating the right accounts would automatically lead to future income for Balfour, since little work would be needed to maintain the accounts. Thus, he contends that his situation is covered by the implied covenant of good faith and fair dealing.

(5) Massachusetts courts have, however, held that "the generalized expectation of future orders in types, quantities and sums not known at the time of termination (in this case Mr.

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[2] To adopt Henderson's view, we would have to accept the notion that for an employer to propose changing the terms of an employee's compensation so as to lower his guarantee but raise his contingent compensation is intolerable, a curious proposaition indeed

Henderson)," Gerald Rosen Co. v. International Telephone and Telegraph Co., 16 Mass.App. 929, 450 N.E.2d 189, 190 (1983) (future orders by insurance salesmen not covered under Fortune concept of bad faith), do not constitute the kind of "future income for past services" that triggers judicial protection under the implied covenant of good faith and fair dealing. Although Balfour has Mr. Henderson's former accounts, given a competitive market it is not clear that it can keep them. Hence, future income is not merely a function of Mr. Henderson's past services. For this reason, Mr. Henderson's contention and the jury's decision that the implied covenant of good faith and fair dealing was breached are incorrect as a matter of (Massachusetts) law.

Conclusion

The district court erred in denying Balfour's motion for a judgment notwithstanding the verdict. The evidence indicates only that, in negotiating Mr. Henderson's contract, Balfour made business decisions that were permitted it by the employment relationship that it had bargained for in 1981. Further, as a matter of Massachusetts law, Balfour breached no implied covenant of good faith and fair dealing in its renegotiation. First, the options offered Mr. Henderson were tolerable and in keeping with any conceivable reasonable expectations arising from his employment relationship with Balfour. Second, if second be required, it cannot be said that Balfour will be earning future income from ring orders that are solely the result of Mr. Henderson's past services. Therefore, because on this record it cannot be concluded that Balfour constructively discharged Mr. Henderson and denied him the direct fruits of his past services, considerations of good faith and fair dealing in the at-will employment contract are not triggered under Massachusetts law.

We therefore REVERSE the judgment of the district court and RENDER judgment for Balfour.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

WILLIAM P. HENDERSON	§	
VS.	§	NO. TY-85-238-CA
L. G. BALFOUR COMPANY	§	

JUDGMENT

The above entitled and numbered cause was called for trial before a jury on the 12th day of May, 1987. After presentation of evidence and argument of counsel, the jury returned a verdict in favor of Plaintiff, William P. Henderson, on May 13, 1987. Based upon the verdict of the jury, it is the opinion of this Court that the Defendant violated its contract and its implied terms of good faith and fair dealing causing damages to Plaintiff, William P. Henderson, in the amount of Two Hundred Sixty-Three Thousand Seven Hundred Sixty-Five and 34/100 ($263,765.34) Dollars.

It is, therefore, ORDERED, ADJUDGED and DECREED THAT Plaintiff, William P. Henderson, have and recover of and from Defendant, L. G. Balfour Company, the sum of Two Hundred Sixty-Three Thousand Seven Hundred Sixty-Five and 34/100 ($263,765.34) Dollars and taxable cost plus interest at the rate of 6.64 per cent per annum from the date of Judgment.

SIGNED this 22 day of July, 1987.

William M. Steger,
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2860

WILLIAM P. HENDERSON,
Plaintiff-Appellee,

versus

L. G. BALFOUR COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 8/18/88 , 5 Cir., 198_____, _____F.2d_____)
(November 22, 1988)

Before BROWN, GEE and GARWOOD, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested

a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs Gee
United States Circuit Judge

APPENDIX E

Joe L. Ramsey
Ralph S. Harper
Ed McMeans
Don Delaune
David Jones
Representatives

BALFOUR

P.O. Box 1198
Greenville, Texas 75401
214/455-4556

April 13, 1981

BILL HENDERSON

1) . . . will not have to take a reduction in gross income based on his 1980 W-2 Form (See Attached)

2) . . . will receive a $6000.00 weekly draw with a yearly settlement for the difference, beginning as soon as the Associate Agreements with both Balfour and Taylor hve been signed.

3) . . . will be paid a bonus for any new business not currently serviced by Balfour and Taylor.

4) Retirement will be based on 100% of the gross commission for the school years 1978-1979, 1979-1980 and 1980-1981 with the equity being equally divided over a five-year period. Retirement will begin at his option, no earlier than July 1, 1984.

5) . . . will continue to reside and office in Tyler, Texas, with the Greenville office reimbursing him for all necessary business long distance phone calls, as well as furnishing scratch pads and calendars. Furthermore, all orders will be entered and billed from the Greenville office. Also, when there are required National Sales meetings, transportation and room will be at the expense of the Greenville office. The Greenville office will assume the added expense of the room when wives are invited.

6) It is also understood that Balfour is to assume all tooling, die and change-over charges for all products.

7) It is understood that Bill Henderson will make every effort to convert all present business to Balfour and Taylor and continue to work toward controlling same.

8) Due to time, distance and expense in travel, and considering the individual personalities and preferences of the customers, there will be some re-assignment of schools.

APPENDIX F

BALFOUR 25 County Street, Attleboro, Massachusetts 02703
617/222-3600

April 24, 1981

Mr. William Henderson
3337 Cameron
Tyler, Texas 75701

Dear Bill:

Your agreement to join the Balfour Company is great news to all of us associated with the company.

I am sending you this letter to describe the most important things we have agreed to. If acceptable, sign it and return the original to me. I will then proceed to prepare a Sales Representative contract which I will forward to you for examination and signature.

This agreement is subject to and conditioned upon your sending a notice of termination of your Sales Representative Agreement with Star Engraving Company before May 20, 1981.

The Balfour Company agrees to enter into an agreement with you which will provide for the payment of a $10.00 per ring over-ride, payable at the end of each fiscal year, which ends June 30, and for three successive years: 1982, 1983, 1984; a 5% discount from the published net price on all paper products and accessory items; that discount to be computed as close to the end of the fiscal year, June 30, as possible, and the adjustment to the net price credited to the commission account of William Henderson with that producing house in the years 1982, 1983, 1984. The bonus for units applies to only those entered into production with the Balfour Company to fill customer orders, less those returned later as undeliverable.

You agree that:

1) You will cause the transfer to the Balfour Company for completion following July 1, 1981, orders from the territory presently assigned you by Star Engraving for high school and college rings and related jewelry, announcements, diplomas, personal cards, albums and other accessories, class and senior keys, pins, awards, recognition products, and disposable caps and gowns.

2) The products are to be supplied to you at the net published price, except for orders quoted in writing at a discount, i.e. less than the published net.

3) During the time of this agreement, which is to run for a period of three years commencing July 1, 1981, to June 30, 1984, you or anyone associated with you agree that you will do all within your capability to comply with the intent of this agreement and to serve the best interest of Balfour.

The Balfour Company agrees to:

1) Provide at no cost to you the tools, die, sketches and art work needed to produce those orders during the length of this agreement.

2) Make repairs to the jewelry products already delivered or to be delivered in the future, under the same rules the Balfour Company guarantees for its products.

3) Provide all the promotional materials, merchandising aids, and assist in converting present customers to the Balfour Company, or to secure future business.

4) Provide legal counsel in the event it is necessary to defend your self or the salespeople under your direction for the transfer of such business.

This agreement shall be governed by the laws of the Commonwealth of Massachusetts.

Please acknowledge your acceptance and agreement of the terms hereof by signing below and returning a copy of this letter to me.

Cordially,

James J. McPadden
Vice President & group
Executive Officer
Educational Products Group

JJM:br

Accepted this 31st day of April, 1981.

William P. Henderson, Sr.

APPENDIX G

SALES

REPRESENTATIVE

AGREEMENT

BALFOUR

JEWELRY'S FINEST CRAFTSMEN

BALFOUR SALES REPRESENTATIVE AGREEMENT

(CLASS RING DIVISION)

AGREEMENT made this 1st day of July 1981, at Attleboro, Massachusetts, by and between

L. G. BALFOUR COMPANY, a Massachusetts corporation, having its principal place of business in said Attleboro, hereinafter called 'Balfour', and Ralph S. Harper, of Greenville, Texas hereinafter called the 'Regional Representative', and William Henderson of Tyler, Texas, hereinafter called 'Sales Representative'.

WHEREFORE IT IS MUTUALLY AGREED, AS FOLLOWS:

TERM

1. Balfour will employ the Sales Representative and the Sales Representative will act as such from the 1st day of July, 1981, until the same is terminated by mutual assent, or by either party for breach of any of the conditions, or by either party by giving thirty (30) days' notice in writing by registered mail.

TERRITORY

2. The territory of the Sales Representative shall be such as he may be required to cover by the Regional Representative from the territory exclusively assigned to the Regional Representative by Balfour.

SALES REPRESENTATIVE'S BASIC DUTIES

3. The Sales Representative shall sell Balfour's products of the Class Ring Division, and the products of any other division of Balfour that may be assigned to him by mutual agreement. The Sales Representative shall devote the whole of his time to servicing the territory assigned to him by the Regional Representative and shall use his best efforts to promote the interest of Balfour in all respects, specifically agreeing not to carry nor foster interest in merchandise whether or not competitive with Balfour except with the written authorization of and assignment to Balfour of commissions. The Sales Representative shall abide by the rules, regulations, instructions and manuals now published or hereafter to be published by Balfour, the same being hereby incorporated by reference and being intended to clarify procedures and matters of routine which it is impractical to set forth in this Agree-

ment. Although the relationship between Balfour and the Sales Representative shall be that of employer and employee, the Sales Representative shall be subject to the immediate direction and supervision of the Regional Representative who assumes responsibility for the actions and conduct of the Sales Representative.

BOND AND INSURANCE

4. The Sales Representative agrees to procure forthwith at his own expense a fidelity bond with corporate surety in a penal sum as required by company policy with Balfour as obligee for the faithful performance of this agreement, and the failure to procure the same, or cancellation of the same, shall entitle Balfour to terminate this Agreement. The Sales Representative shall at all times maintain at his own expense automobile insurance covering himself against liability for personal injury and property damage in amounts that shall from time to time be determined by the rules and regulations of Balfour referred to in Paragraph 3 above.

SAMPLE LINES

5. Balfour agrees to furnish a sample line, and necessary instruction, materials and information that may be prepared from time to time, all of which the Sales Representative agrees shall remain the property of Balfour, and shall be returned by him on demand, together with all his files and records accumulated during his employment. The Sales Representative shall deal with the aforesaid Balfour property in a confidential manner and shall be liable if it is lost or damaged through his negligence.

COMPENSATION

6. The compensation of the Sales Representative shall be agreed on between the Regional Representative and the Sales Representative which shall include a salary for the Sales Representative and an allowance for his expenses. Balfour agrees to advance this mutually agreed on amount to the Sales Representative, and the same shall be charged to the Regional Representative. Balfour shall make the necessary deductions for the withholding tax and Social Security.

PROTECTION OF THE SALES REPRESENTATIVE

7. In the event of the death, or physical or mental incapacity, of the Sales Representative during the life of this agreement and

after the completion of five (5) full selling seasons under this Regional Representative agrees to pay an amount equal to forty per cent (40%) of the Sales Representative's salary for a period of two (2) years. In computing the salary for this purpose, expense allowances, bonus and any amounts over and above the agreed on salary will be excluded. The salary shall be the salary in effect at the time of such death or incapacity. The Regional Representative shall determine whether the physical or mental condition of the Sales Representative results in incapacity, and his determination shall be binding providing Balfour agrees that his decision is reasonable and made in good faith. In the event of the death or physical or mental incapacity of the Regional Representative under such circumstances as would entitle the Regional Representative or his estate to receive commissions on term contracts, by virtue of an existing Balfour Regional Representative's Agreement, the Sales Representative agrees, providing he takes over the territory of the Regional Representative, that commissions shall be paid according to the Balfour Regional Representative's Agreement. Nothing in this Agreement shall indicate that the Sales Representative is entitled as a matter of right to succeed to the position of the Regional Representative.

AGREEMENT NOT TO COMPETE

8. In the event of the termination of this Agreement for any reason, the Sales Representative agrees that for a period of two (2) years after such termination, he will not directly or indirectly, for himself, or as agent of, or in behalf of, or in conjunction with any person, firm, association, or corporation, sell or solicit orders for any other merchandise of the kind or character manufactured, or sold by Balfour within the territory that had been assigned to the Regional Representative.

MISCELLANEOUS

9. (a) Balfour shall not be obligated to the Sales Representative on orders which are not filled by Balfour because it has ceased or suspended dealing in such merchandise for any reason including, without limiting the generality of the foregoing, voluntary cessation in dealing with such products, fires, strikes, Acts of God, acts of public authorities, delays and defaults by public carriers.

(b) Balfour shall not be responsible for any selling, advertising and office expenses of the Sales Representative.

(c) The Sales Representative is employed solely as a Sales Representative and has no authority to bind or obligate Balfour for any expenditure or by any contact of any nature and specifically shall not guarantee any Balfour products except by the written authorized guarantee customarily used by Balfour.

(d) All contracts and orders are subject to acceptance by Balfour in Attleboro. The Regional Representative is responsible for any orders sold and approved by the Sales Representative for shipment on open account. Bad debts may be charged to the Regional Representative at net price. The Sales Representative shall promptly transmit to Balfour funds collected by him on any open account.

(e) Balfour shall not be obligated to consign merchandise to the Sales Representative for delivery by the Sales Representative. If, however, such shipments are made by Balfour, title to the merchandise remains in Balfour and the funds collected by the Sales Representative shall be transmitted promptly to Balfour.

APPLICABLE LAW

10. This Agreement wherever signed shall be deemed to have been made in the Commonwealth of Massachusetts and shall be construed in accordance with the laws of Massachusetts. It supersedes all previous agreements between the parties. It constitutes the whole Agreement between the parties and there are no terms nor conditions, nor obligations made, or entered into, by Balfour other than contained herein. This Agreement is not binding until the same has been accepted and approved by an officer of the L.G. Balfour Company.

IN WITNESS WHEREOF, the L.G. Balfour Company has caused its corporate name to be signed and the Regional Representative and Sales Representative have hereunto set their hands and seals the day and date above written.

L. G. BALFOUR COMPANY

Wes Cooper,
Southwestern District Manager

Ralph S. Harper,
Regional Representative

William Henderson
Sales Representative

Accepted and approved at
Attleboro, Massachusetts

L.G. BALFOUR COMPANY

Robert A. Bourbeau
National Sales Manager
Educational Products Group

James J. McPadden
Vice President & Exec. Group Officer
Education Products Group

APPENDIX H

Henderson - Direct

Q It was all done through Balfour?

A It was under the umbrella of Balfour, yes.

Q And continue to work toward — okay — present business of Balfour and Taylor, and continue to work toward controlling same. Now, why was it important to not only convert the business, but to control the same?

A Well, in this business when you move or change companies, it would be very difficult—sometimes you may not be able to convert all of that business. And, certainly, Wes Cooper, who was the Divisional Sales Manager was quite concerned about that, as I was, to protect myself and my family. I said I need some type of guarantee, because if I get this business converted, then it's going to take some time stabilize it. Some of these people may not like Balfour. They may not like their operation. They may not like their product, and I may lose some of them. So, he felt that I needed time to be able to convert them, and also stabilize them, get that business in order and in line for doing business with Balfour.

Q What type of problems--what kind of glitches, as far as delivery or quality of product or so forth did you run into in your conversion?

A Well, for one thing, Star Engraving Company was located in Houston, Texas, and all of our products were made there under one roof. And when we moved with Balfour, well, the rings were made in Attleboro, Massachusetts, diplomas in an-

other plant. There were different operations for them. They were very large, and so, they had different plants set up throughout the United States that I felt could be a problem in getting delivery. So, we had to deal with that problem.

Now, was there a time period that you and Balfour agreed you would have to have to convert and control this business? In other words, was there a three time period that you talked about?

A Well, that was one—just arbitrary three years. We felt that it would take that much time, the converting and the stabilizing.

Q Was it ever suggested to you that you would only be working there for three years?

A No, absolutely not.

Q The next document is marked as 2-A. There's a couple of things I wanted to ask you about here. First of all, it says Balfour agrees to enter into an agreement with you, which will provide for payment of ten dollars per ring override, payable at the end of each fiscal year, which ends June 30th. Now, during the three plus years that you worked at Balfour, did you ever receive ten dollars per ring override in addition to what you were being paid?

A No, I did not.

Q Can you give us on a conservative side the number of rings that you sold while working at Balfour?

start working for Balfour; it that correct?

A Yes, it was.

Q Is that July, 1981?

A Correct.

Q Now, was there any date in which your were supposed to cease working for Balfour?

A No.

Q It was open- ended then?

A Open-ended.

Q Did they make any representations to you, or make any suggestions to you about whether or not you'd be able to work out the rest of your career with Balfour?

A I assumed I work out the rest of my career with Balfour.

Q Did you assume that on your own, or was that as a result of what Mr. Harper and the others had told you?

A That was the whole atmosphere of the meetings that I would continue working for them, until death do us part I'll say.

Q Would you have agreed to spend three years converting a hundred and sixteen schools and three hundred and sixty thousand dollars worth of sales to Balfour, if that had not been the representation made to you?

MR. BINION: Objection, Your Honor. That's calling for an opinion and conclusion of the witness, and the docu-

ments speak for themselves.

THE COURT: Well, rephrase the question.

BY MR. BAILEY:

Q If it had not been represented to you that this was a job that you could throughout the rest of the term that you intended—time you intended to work, would you have agreed to convert a hundred and sixteen schools and over three hundred and sixty thousand dollars worth of gross sales to the Balfour Corporation?

A No, I would not, because all the other competitors that asked me to go with them, certainly had as good or a better agreement to go with them. So, I had other alternatives, yes.

Q Now, in the compensation section of this contract, it indicates that that compensation was to be determined by the sales representative or the Regional Manager, I guess you could call it; is that correct?

A Yes.

Q Now, there's nothing in the contract itself that outlines the compensation. That's something that you and Mr. Harper talked about: is that correct?

A That's correct. And Wes Cooper.

Q On the second page of that same document, which we have labeled as 3-A, in the first title of the paragraph it says, agreement not to compete, and in this it was indicated that you could not, if you left Balfour, do your profession in this

area for at least two years; is that correct?

A That's correct.

Q Did you understand that to be a part of the agreement you had with Balfour?

A Yes, I did.

Q Would you have agreed to that, if it had not been represented to you that you would be able to serve out the rest of your time with Balfour as a sales representative?

A No, I couldn't afford to. No.

Q And at the bottom of this it says principal law, and the Massachusetts corporation wanted to follow the Massachusetts law; is that correct?

A That's correct.

Q Take a seat.

A (Witness complies.)

Q Now, dealing with the agreement that you had with the regional representative, or Mr. Harper, what was the agreement? Was it the minimum of fifty-four thousand three hundred dollars we talked about earlier?

A Yes, that was the basis, yes.

Q And he also discussed with you a bonus of ten dollars per ring?

A It should have been through Mr. McFadden, yes.

Q Now, who is Mr. McFadden?

A He's the Vice President of the company.

Q Okay. And, also, the five percent discount on paper products?

A Yes.

Q Now, what did you actually receive during the three years that you worked with Balfour before the meeting you had concerning continued employment there?

A The fifty-four thousand.

Q Now, during that period of time, did Balfour cover any of your expenses? And I'm talking about travel expenses or office expense or anything of that nature?

A Expenses they paid were long distance telephone calls, note pads that we distributed to schools and calendars — activity calendars. They paid for that.

Q Well, what about an office or anything of that nature?

A I provided my own office in my home in Tyler, Texas.

Q Well, how much did they pay on your long distance bills per month?

A Approximately twenty-five or thirty dollars a month, I would suppose. Strictly business calls.

Q Now, what was your understanding from Balfour as to how long this minimum salary of the fifty-four thousand three hundred dollars was to be paid?

A We talked about it many times, and it would be three years, and after that, it would be renegotiated.

Q Now, when it was discussed that it was going to be rene-

gotiated at the end of the three years, what was the task that you were to perform during that three years as a basis of determining what your salary should be after that point?

A It was my complete understanding that in that period of time I was to convert the Star business and stabilize it for Balfour, and that appeared to be my basic job.

Q What was your understanding from the Balfour representatives as to whether or not you should ever make under fifty-four thousand three hundred dollars while working for Balfour?

A Well, I felt like that was the base, and I was willing to accept that for there years.

MR. BINION: Excuse me, Your Honor. I would like to object to the question and answer, unless they identify who said what to whom and fix the time and place, because if we're talking documents, they will speak for themselves, but if we're talking conversations, I'd like for the time and place to be fixed.

THE COURT: Be more specific.

MR. BAILEY: May I approach the witness, Your Honor?

THE COURT: Yes.

BY MR. BAILEY:

Q Was it your understanding from the exhibit, which has been marked as 1-A, and I'm talking about the first paragraph at the top there, that while you were working for Balfour you will not have to take a reduction in gross income based on

your 1980 W-2 Form?

A That's correct.

Q And was it your understanding that that was to be true, as long as you worked for Balfour?

A That's the way I understood it.

Q What was your understanding in your discussions — well, tell us who you had your discussions with besides Mr. Harper concerning this contract that you signed.

A Wes Cooper.

Q What was your understanding from your conversations with Mr. Cooper or Mr. Harper as to what was to happen to your compensation at the end of three years, if you were able to convert and maintain all of this new business for Balfour?

A Well, my understanding is that I would be so rewarded for it; that I would be compensated even more, because if I did a good job, it would certainly be to their benefit to receive all this business and the fact that I had stabilized it.

Q Why didn't you complain about the fact that you did not receive the ten dollars per ring that you sold on the accounts?

A It was mentioned to Mr. Harper, and I guess being a team player, I didn't pursue it. My mistake.

Q Can you give us an estimate as to your gross sales for the period you were at Balfour?

A It had to be in excess of the three hundred and sixty thousand that I had provided when I came.

Q What were you expecting from the meeting?
A I was expecting an increase in pay.
Q What were you offered at the meeting?
A No offer at the original meeting. They said that they would work up — I say they. That's Roger Smith and Ralph Harper said that they would work up some proposals for me to look at and to decide upon.
Q Did you later receive those proposals?
A Yes, I did.
Q And do you recall what those proposals said?
A Well, I was offered three proposals. Do you want me to explain the three?
MR. BINION: I think the letter would be the best evidence of what the proposals were, Your Honor.
BY MR. BAILEY:
Q I'll show you what's been marked as Plaintiff's Exhibit No. 6 and 7. Can you identify these for me, please, sir?
A Yes, I can. May 29th, the cover letter says that these are the proposals that we have — that we are providing both you and Mr. Harper options, and it's signed by Roger Smith and Ralph Harper.
Q Okay, that's Exhibit No. 6?
A Exhibit No. 6.
Q What is Exhibit No. 7?
A They are thanking me for driving in this past Wednesday,

APPENDIX I

Indeed, in the two years following the 1981-1982 school term, Henderson's total sales actually declined. Tr. 137-38. This decline occurred even though Henderson was required to expend virtually no effort to hold onto his business once it had ben stabilized. Tr. 179.

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